No. 2942

IN THE

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT

SOUTHERN PACIFIC COMPANY, (a corporation),

Plaintiff in Error,

vs.

GERTRUDE WRIGHT and ORENE WRIGHT and ORA WRIGHT, by GERTRUDE WRIGHT, their Guardian *ad Litem*,

Defendants in Error.

Points and Authorities on Behalf of Defendants in Error

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POINTS AND AUTHORITIES ON BEHALF OF DEFENDANTS IN ERROR.

STATEMENT OF CASE.

In accordance with the rule of this Court, we deem it proper to make only such addition to the statement of facts presented in the brief of plaintiff in error, as will, together with that statement, make a complete and fair statement of the facts of the case.

The train that collided with the truck was a regular

passenger train of the company, was on time, and immediately prior to the accident and up to the time of the accident was running within the corporate limits of the City of Selma at a rate of about 42 miles per hour. An ordinance of the City provided that the rate of speed should not exceed eight miles per hour. The point from which the truck started southerly was east of the railroad track at what is known as the oil tanks, same being about 1400 feet north of the railroad crossing where the collision occurred. The driveway along which the truck passed from the oil tanks to the crossing on which the collision occurred is about 60 feet east of the main track of the railroad and turns on a curve into Arrants Street, which is the crossing street on which the collision occurred. The curve commences (measuring along the driveway) at about 145 feet from the main track of the railroad where the collision occurred. Arrants Street crosses the railroad tracks at nearly a right angle, and extends westerly from the railroad track to the roadway known as West Front Street in the City of Selma, and also extends easterly from the railroad tracks through that part of the City. The street or driveway down which the truck pursued its course, prior to the attempted crossing of the railroad track, is East Front Street, and it extends onward, parallel with the railroad, through that part of the City of Selma. There is maintained on the railroad right of way, a packing house, which abuts on the south line of Arrants Street, and the loading platform of the packing house is probably six feet wide, and is on a line with and adjacent to the side of cars standing upon the first track for purposes

of loading. In approaching the crossing in question from the course taken by the truck, it is necessary for the driver of a truck, or any other vehicle crossing that way, to observe the approach of vehicles which may be coming from the east on Arrants Street, and also from the south on East Front Street, so as to avoid collision with any such vehicles so approaching the same point of crossing. The packing house on the railroad right-of-way obscures the view to the south of both the main and the side tracks of the railroad, and a view in that direction cannot be had by a person passing onto the railroad crossing in question until the vision of the driver has cleared the side of the packing house adjacent to the railroad tracks. Mr. Tucker, the driver of the truck, at the curve of East Front Street into Arrants Street, preparatory to making the railroad crossing, and at about 140 or 145 feet from the main track of the railroad, looked up the track in a northerly direction, where he had a clear view to a point further than the oil tanks. Thus, he had a clear view of the track northwesterly for at least 1600 feet from the crossing where the collision occurred. There was no train on that section of the track at that time. So at the time of the looking by both Tucker and Wright there was no train within 1600 feet of the crossing where the collision occurred, and there was no noise of any approaching train. Neither Mr. Tucker nor the deceased knew that any train was approaching at any point, and both knew that no train approaching from the northwest was within 1600 feet of the crossing at the time that they, in the motor truck were 145 feet from the main track of such crossing. The

train that did collide with the truck came from somewhere up the railroad track, with the steam shut off, and without ringing a bell, or sounding a whistle, and making no noise except the rumble of the wheels that attends the movement of the train when "drifting in." At the curve, after observing the track clear for 1600 feet to the north, Mr. Tucker gave his attention to the approach from the east on Arrants Street, and to the approach from the south on East Front Street into Arrants Street, and then to listening and looking for any train or locomotive or moving car that might be approaching the crossing, either upon the side tracks or the main track, from the south. Then as soon as his attention could be taken from the danger of trains coming from the south, he saw the train coming from the north at a point 300 or 400 feet from the crossing. This was at the instant that the front wheels of the truck were going upon the main track of the railroad at the crossing. On seeing the train he accelerated the speed of the truck in an attempt to clear the train, which was coming at a terrific rate of speed, but the train collided with the rear wheel of the truck, and caused the truck to be wrecked, the driver Tucker, to be seriously injured and Wright killed.

ARGUMENT.

In this case there arise the following questions:

1. Was the driver of the truck, Mr. Fred Tucker, negligent in approaching the crossing where the collision

occurred, under the circumstances then existing, and with only the precautions taken by Tucker in so attempting said crossing?

2. Did the relation of master and servant exist between the deceased Wright, and the driver of the truck, Tucker, the former being the master, and the latter the servant?

3. If Wright was not the master of the driver of the truck, does the evidence show such negligence on the part of Wright, the deceased, as to prevent a recovery for his death?

Plaintiff in error, in its brief has undertaken to answer all of these questions in the affirmative, and therefore concludes that in any event the defendants in error in this action were not entitled to recover any damages from the plaintiff in error.

It would seem from the argument of counsel, and from the authorities cited, that plaintiff in error relies most strongly upon the proposition that the relation of master and servant did exist between the deceased as master, and the driver of the truck as servant. Mr. Tucker, the only witness who testified upon this point, stated:

> "I had full charge of the operating of the truck. * * * * Mr. Wright had been riding with me on this truck during that morning up to the time of the accident. * * * Q. Did Mr. Wright have anything to do with the operating of the machine? A. None whatever. Q. Did he assume, in other words,

did he give you any directions or instructions or say anything to you as to how it should be operated? A No, sir. (Tr. fol. 36-37). In a way I was fulfilling two things, demonstrating the truck to Mr. Wright and also doing some work for him. He was paying for the use of the truck, renting it. I was driving the truck for Mr. Phelan; I had charge of it, was the driver to go with it, and Mr. Wright was paying the rental for it. (Tr. fol. 43). * * * Mr. Phelan said he would rent Mr. Wright the truck for $15 a day providing I would drive it, but he would not rent it to him, let him drive it, because he did not know him and did not know whether he knew how to drive it or not, and he knew that I knew how to drive it. He said that. I was working for him. I had worked for Mr. Phelan before that. Mr. Phelan only said it was all right over the phone, providing I would drive it. I had no arrangement with Mr. Wright about employing me. He was to get the truck for $15 a day." (Tr. fol. 46).

It will thus be seen that the evidence clearly shows that this truck was the property of J. C. Phelan; that the driver of the truck, Mr. Tucker, was designated by J. C. Phelan to drive the truck in transferring the freight for Mr. Wright, the deceased, and that the deceased had hired the truck with the driver from Mr. Phelan for that purpose. This evidence likewise shows, together with other evidence to the same point, that the driver of the truck was an experienced driver, and knew how to

handle the truck. Wright had nothing whatever to do with the management or control of the truck, and did not either manage or control, or undertake to manage or control same. Therefore, there was no relation of master and servant between the driver of the truck and the deceased. There was no identity of the driver and the deceased with reference to the management or control or mechanical operation of the truck. It is well settled law that where there is not this relation between the driver of a vehicle and a passenger being carried by the vehicle, the negligence, if any, of the driver is not imputable to the passenger.

The case of Little vs. Hackett, 116 U. S. 366, was one where a man hired a coach and driver to drive the hirer to a railroad station, and on arriving at the railroad station discovered that he had time to visit a park, and therefore directed the driver of the coach to drive through the park, and in going to the park the driver crossed a railroad track, and through the combined negligence of the employees of the railroad and the driver of the coach, there was a collision which resulted in injury to the passenger. The court left the question of the relation of the driver and the passenger to the jury, and on that point charged the jury as follows:

> "I charge you that where a person hires a public hack or a carriage which at the time is in the care of the driver, for the purpose of temporary conveyance, and gives directions to the driver as to the place or places to which he desires to be conveyed,

and gives him no special directions as to his mode or manner of driving, he is not responsible for the acts or negligence of the driver; and if he sustains an injury by means of a collision between his carriage and another, he may recover damages from any party by whose fault or negligence the injury occurred, whether that of the driver of the carriage, in which he is riding or of the driver of the other. He may sue either. The negligence of the driver of the carriage in which he is riding will not prevent him from recovering damages against the other driver, if he was negligent at the same time."

"The passenger in the carriage may direct the driver where to go, to such a park or to such a place that he wishes to see; so far the driver is under his direction; but my charge to you is that as to the manner of driving, the driver of the carriage, or the owner of the hack, (in other words, he who has charge of it, and has charge of the team.) is the person responsible for the manner of driving; and the passenger is not responsible for that, unless he interferes and controls the matter by his own commands or requirements. If the passenger requires the driver to drive with great speed through a crowded street, and an injury should occur to foot passengers, or to anybody else, why then he might be liable, because it was by his own command and direction that it was done; but ordinarily in a public hack, the passengers do not control the driver,

> and therefore I hold that unless you believe Mr. Hackett exercised control over the driver in this case, he is not liable for what the driver did. If you believe he did exercise control and required the driver to cross at this particular time, then he would be liable because of his interference."

The Supreme Court of the United States in a very carefully considered opinion, held this instruction to be the law, and after reviewing the cases, stated:

> "In this case it was left to the jury to say whether the plaintiff had exercised any control over the conduct of the driver, further than to indicate the places to which he wished him to drive. *The instruction of the court below*, that unless he did exercise such control and required the driver to cross the track at the time the collision occurred, the negligence of the driver was not imputable to him so as to bar his right of action against the defendant, *was therefore correct, and the judgment must be affirmed, and it is so ordered.* (Italics ours).

In this case at page 377, it is held by the court that the relation of master and servant must exist between the passenger and driver to the extent that the passenger controls or has the right to control the conduct of the driver, before any negligence of the driver may be imputed to the passenger. The Supreme Court in this action after reviewing the authorities, approved the doctrine that the principle involved is the same whether

the passenger is a passenger upon a steam or electric railroad or an omnibus or vehicle of any kind, or whether he be a passenger for hire or a passenger for accommodation upon the invitation of the owner or driver of the omnibus, vehicle or other conveyance (378).

The foregoing case is cited and followed in many cases, but we deem it sufficient to cite:

Evans v. Lake Erie Etc., Railroad Company,
78 Federal, 782.
Kowalski v. Chicago G. W. Ry. Co.,
84 Federal, 586.
Thompson v. Los Angeles Etc., Ry. Co.,
165 Cal. 748.
Tousley v. Pacific Electric Ry. Co.,
166 Cal. 458.
Fujise v. Los Angeles Ry. Co.,
12 Cal. App. R. 207.
Bryant v. Pacific Electric Railway Company,
53 Cal. Decisions, 459.

In the case last cited, it appeared that the plaintiff was riding home with his son in an automobile, which automobile was owned by a close corporation, consisting of the father, mother and son, who lived together, and that the machine was used by the corporation for the purpose of making collections of furniture to be upholstered, and then redelivered to the owners. The machine was kept in a garage at the home of the father and the son. At the time of the accident, it being in

the evening, the son was driving the machine (as was his custom) for the purpose of first making a delivery and then proceeding on from the place of delivery to the home of the father and son. It appeared that the accident that resulted in the injury to the father was attributable to the negligence of the railway company and of the son. The trial court determined upon the trial that as a matter of law, the negligence of the son, if any, was imputable to the father under the circumstances of that case, but upon a motion for new trial, the court re-considered its action, and holding its former instruction as error, granted a new trial. From that order, the defendant appealed. The Supreme Court of California held:

> "A guest or passenger in a vehicle driven or operated by another is not, ordinarily, bound by the negligence of the driver or operator. (Parmenter v. McDougall, 172 Cal. 306.)"

Upon the question of joint or common enterprise the court quotes from Ruling Case Law as follows:

> "There seems to be no difference of opinion as to the rule that when two persons are engaged in a joint enterprise in the use of an automobile, the contributory negligence of one will bar a recovery by either, if it is in a matter within the scope of the joint undertaking." (Vol. 2, p. 1208, Sec. 43.)

But the court states:

> "But in order that there be such a joint under-

taking, it is not sufficient merely that the passenger or occupant of the machine indicate to the driver or chauffeur the route he may wish to travel, or the place to which he wishes to go, even though in this respect, there exists between them a common enterprise of riding together. The circumstances must be such as to show that the occupant and the driver together had such control and direction over the automobile as to be practically in the joint or common possession of it."

Again quoting:

"Parties cannot be said to be engaged in a joint enterprise, within the meaning of the law of negligence, unless there be a community of interest in the *object or purposes* of the undertaking, and an equal right to direct and govern the *movements and conduct of each other with respect thereto.* Each must have some voice and right to be heard in its control and management." (St. Louis Etc. Ry. Co. v. Bell, 159 Pac. (Okl.) 336; Atwood v. Utah Light Etc. Ry. Co., 140 Pac. (Utah) 137; Cotton v. Willmar Etc. Ry. Co., 109 N. W. (Minn.) 835.).

The court further stated:

"It may be conceded that the plaintiff and his son were jointly interested in the conduct of the business of the corporation. But it does not necessarily follow that they possessed a joint or com-

munity interest *in the matter of driving the automobile.*

The case at bar would seem to be a clearer case of no community interest in the operation of the automobile, than the case last cited. In that case the Supreme Court of California held that the relation of the parties was a proper matter to be submitted to the jury. In the case at bar, the evidence clearly shows not only that the deceased did not exercise any control over the driving or operation of the truck, but that the very terms upon which the automobile was rented precluded the deceased from having anything whatsoever to do with the mechanical operation or driving of the truck.

The authorities cited in counsel's brief, upon the question of negligence, seem to be intended by counsel to be directed indiscriminately to the question of the negligence of the driver, the imputability of the negligence of the driver, if any, to the deceased, and the independent negligence of the deceased, if any.

Negligence is defined to be:

> "The omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do; moreover it is not absolute or intrinsic, but always relative to some circumstance of time, place or person." (Broom's Legal Maxims, 329; Richardson v. Kier, 34 Cal. 75.)

"The fact of negligence is generally an inference from many facts and circumstances, all of which it is the province of the jury to find. It can very seldom happen that the question is so clear from doubt that the court can undertake to say, as matter of law, that the jury could not fairly and honestly find for the plaintiff. It is not the duty of the court in such cases, any more than in any other, to usurp the province of the jury and pass upon the facts. And the nonsuit should only be granted in such cases where the evidence of the misconduct on the part of the injured party is so clear and irresistible as to put the case on a par with those cases where a nonsuit is granted for a failure to introduce evidence sufficient to go to the jury upon some point essential to the plaintiff's case. The fact must be so clear that, *looking upon the plaintiff's case in the most favorable light, and giving him the benefit of all controverted questions*, the court can see that a verdict in his favor must necessarily be set aside." (Schierhold v. N. B. & M. R. R. Co. 40 Cal. 447.)

Jamison v. San Jose & Santa Clara Railroad Co.,
55 Cal. 593, 596.
Baltimore Etc. R. R. Co.,
95 U. S. 439.
29 Cyc. 416-418.
King v. City of Cleveland,
28 Fed. 835, 837.

"All of the surrounding circumstances must be

taken into account if the question involved is one of negligence, such as the opportunity for deliberation, degree of danger and many other considerations."

21 Cyc. 418.

Taking the view most favorable to the defendant in error, of the evidence in this case, the facts are these:

When the driver of the truck in question was at a point not to exceed 145 feet from the main track which he desired to cross he observed the track to the north, from which direction the train actually came, and found that for a distance of 1600 feet from the crossing of the main track there was no train. His hearing was good, and he listened and heard no train coming at any point. The driver and the deceased therefore did not know that any train was at any place approaching the crossing in question, but did know that no train was approaching that crossing from that direction within a distance of 1600 feet, all of which was within the city limits. There was East Front Street from the south, and Arrants Street from the east to be observed by the driver in order to avoid any collision with vehicles approaching from those directions. The view of the track of the railroad company to the south was obstructed by a building maintained on the street line of Arrants Street at the south, same being on the right of way of the railway company. It was necessary for the driver to guard against approaching trains, or switching trains, from that direction. He was traveling at the rate of 4 miles

an hour from that point to the crossing, and therefore would clear the crossing in less than 26 seconds from the time he observed the track and found it clear for a distance of 1600 feet. In order to reach the crossing in time to run down the truck, it was necessary for the train to travel over a space of 1600 feet in less than 26 seconds, or at a rate of speed exceeding 42 miles an hour. It is true that other witnesses, one of them almost directly in front of the train, and 200 feet or more south of the crossing, upon a mere estimate, stated that the train was going "about 30 miles an hour," but as Mr. Tucker was the driver of the truck, and acquainted with the speed of the machine, and measured the distance, his testimony must be taken as the facts established in the case. If those facts be, and it is apparent that they are, the most favorable view of the evidence to the defendant in error, then the facts established are that the train that destroyed the life of Wright, and wrecked the truck, and injured the driver, Mr. Tucker, was traveling at a rate of speed exceeding 42 miles an hour. It had evidently come within the city limits at a speed greatly in excess of 42 miles an hour, and had for the purpose of effecting a stop at the railroad station, three blocks beyond the crossing where the collision occurred, shut off the steam and permitted the momentum of the train to drive it on at this reckless rate of speed, without sounding the whistle, or ringing the bell. We believe that it cannot be said as a matter of law that the action of the driver was negligence, and and indeed it seems to us that as a matter of fact under the circumstances here the driver of the truck

himself exercised that due care and caution for his own safety and the safety of his passenger that the ordinary prudent man would exercise under like circumstances. It will be kept in mind that the railroad train was being operated within a city. That the railroad company had itself created an obstruction to the view beyond the crossing to the south, and that that obstruction, required the close and careful attention of any and all persons approaching that crossing and going westerly so as not to be driven upon by a locomotive or train coming from the south after they were actually upon the track. It will be remembered that the circumstances and conditions surrounding this crossing are such that the legislative body of the City of Selma had made it unlawful to operate or propel a train at that place in excess of a speed of eight miles per hour. We do not contend that the mere fact that the law of the city was being violated by the excessive rate of speed of the train would excuse the contributory negligence of the driver of this truck, if such contributory negligence appeared, but we do contend that an ordinary prudent man would not only have a right to assume, but would ordinarily assume that no train would be operated at that place and under those circumstances at such a reckless rate of speed as 42 miles or even 30 miles per hour. If the train had been operated at 12 or 15, or possibly 20 miles per hour, a reasonable man might have expected the same, but to say that any reasonable man would expect a heavy train to be permitted to go recklessly through a part of a city, (where there were numerous crossings being used by the public), without

ringing a bell or sounding a whistle, and the steam shut off so that the train made practically no noise, would, as it seems to us, be equivalent to saying that reasonable men must believe that operators of railroad trains are not only persistently and wantonly negligent, but that they are so wantonly and wilfully negligent as to be in such cases criminals. This a reasonable man cannot be expected to assume or believe. It would seem therefore that the question of exactly where and when the driver of this truck should have observed the track of the railroad from whence the train came, was a question proper to be submitted to the jury if that question had been an issue at all in this case.

A careful review of the authorities, upon the question of negligence of the driver of this truck, cited by plaintiff in error discloses that in those cases, we believe with one exception, the view of the railroad track was obstructed at some point near the railroad track, so that the person approaching the track could not until within a certain distance of the track see whether or not there was a train approaching. It is unquestionably the law that a railroad track is a sign of danger, and that any person intending to go upon the track or cross it must so regard it and must therefore take that reasonable precaution that a reasonable and prudent minded man would take *under the existing circumstances*. There was no obstruction in the case at bar to the vision of the occupants of the truck to the north, for 1600 feet. This circumstance is not found, neither is it considered in any case cited by counsel.

The case of *Brommer v. Penn. R. Co.*, 179 *Fed.* 577 is a case in which the driver of the automobile at a point 170 feet from the track could have had, if he had looked, a clear view of the railroad track in the direction from which the train came, for a distance of 1400 feet. Judging from the speed at which he was driving he evidently did not *look* at the point where he had an unobstructed vision of 1400 feet of the track, because the facts disclose that the train was actually at that time within that view. After that the track was obstructed until he arrived at a point within 30 or 40 feet of the track, and drove upon the track without then looking or listening for a train. This the court in that case held to be contributory negligence; and it should be remarked at this point that the court in that case did not hold that the man who was in the front seat with the driver, and who did not look either at the 170 foot point, or after the obstructions were past, should not recover in the case because the *negligence of the driver* was imputed to that person, but did hold that such conduct on the part of that person at that time and place was independent negligence of that person himself, and for that reason he could not recover.

In the case of Northern Pac. Ry. Co. v. Tripp, 220 Fed. 286, cited by counsel, the injured person was driving at a slow rate of speed, and saw the track 800 feet at a point 116 feet from the track, and then drove on, passing an intervening obstruction to his view, without again looking, and the court held there that he was guilty of contributory negligence as a matter of law.

In the case of Rebillard v. Minneapolis, St. P. & S. S. M. Ry. Co. 216 Fed. 503, cited by counsel, it appears that the injured party was riding at night time in an automobile with the driver of the machine without any lights, and that the passenger knew that there were no lights, and therefore knew the danger of driving the machine in any place under those circumstances; and the fact that he submitted himself to the dangers incident to such recklessness, of course absolved the railroad company from the payment of any damages resulting from the machine being driven *without lights at night* into an excavation by the side of the railroad left open by the railroad company.

In the case of Erie R. Co. v. Hurlburt, 221 Fed 907, (and this is the one case that we referred to in the opening of this part of the argument as the exception to the general trend of cases cited by counsel) it appears that a man was driving a horse and buggy, carrying his wife as a passenger, and that when he approached the railroad crossing at a point 15 feet from the track he stopped and looked in the direction from which the train came, and that from that point the occupants of the buggy had a clear vision of the track for 1500 feet to a point where the coming train would emerge from a deep cut. The evidence of the wife was that they both looked at that point, and that no train was within that vision, and that they proceeded on to the track and that just as they went upon the track she looked through an opening in the buggy curtain, and had the same vision of the track, *and saw no train, be-*

cause no train was there. The court did not hold that to look at that place or any other place, or not to look at that place, or any other place, was contributory negligence, but did hold that as a matter of physical fact, *the train was there*, and did collide with the buggy, and that the statement of the witness that she looked at the very instant that the train collided with the buggy, *and no train was there*, could not in the face of the physical facts be regarded as any evidence at all. Needless to say, this case is not in point in any respect with the case at bar.

In the case of *Herbert v. Southern Pacific Company*, 121 Cal., 227, cited by counsel, the driver of the vehicle passed a siding at Penryn, and proceeded onward to the point of crossing where the collision occurred. When he passed Penryn a freight train was standing on the side track, and he knew that it was awaiting the passing of a passenger train coming in the opposite direction, and would then proceed in the same direction that he was traveling. It was 2980 feet from the siding to the crossing at which the collision occurred. The whistling post of the crossing in question was 1320 feet from the crossing. The driver of the vehicle proceeded at the rate of about 7 miles an hour, and when he was more than 1000 feet from the crossing he heard the "toot" of the freight train, and then knew that the freight train at that time had left the siding, and was proceeding onward to the same crossing where he attempted to cross the track. Thus, the train had less than three times as far to travel to reach the crossing

as he, the driver of the vehicle had. When at a point 450 feet from the crossing he assumed that the freight train had not yet reached the whistling post, because he did not hear it whistle. He rounded a hill, and without again looking or listening, drove on to the track, and was injured by the train. He slackened his speed, and drove less than 7 miles an hour to the point of collision. The court held that as a matter of law, he, knowing that the train was coming, and that it was less than 2980 feet from the crossing when he was more than 1000 feet from the crossing, had no right to assume that the operators of the train would whistle at the whistling post, and that to proceed under circumstances of that kind, with full knowledge of all of the facts, was contributory negligence on his part, and prevented any recovery for that reason.

In the case of *Holmes* vs. *S. P. Coast Ry. Co.*, 97 Cal. 161, cited by counsel, the evidence shows that the plaintiff placed himself in a situation of danger at a time when he was waiting for a train that he was expecting to arrive; that he walked back and forth on a narrow walk adjacent to the railroad track without observing whether or not a train was approaching, and that just before the accident he turned his back upon the train and walked from the direction from which the train should arrive; that upon the hearing of the sound of the train, and being thus still in the place of danger, he stepped upon the track. It was of course held that he was guilty of such negligence as would prevent a recovery.

In the case of *Pepper vs. S. P. Co.*, 105 *Cal.*, 389, cited by counsel, the evidence showed that the plaintiff did not at any time look to see whether a train was or was not approaching, that the rate of speed of the train at that particular place was not a material matter, and under those circumstances it appeared from the evidence without conflict that the plaintiff took no precaution whatever.

In the case of *Studer v. S. P. Co.*, 121 *Cal.* 400, cited by counsel, the evidence showed that the train that caused the injury was standing across the roadway crossing, and had been standing there for some time, and the injured person, a boy twelve years of age, undertook to cross the track between two of the cars of the train.

In the case of *Green vs. S. P. Co.*, 132 *Cal.* 254, cited by counsel, it appeared that the plaintiff could by looking before attempting the crossing have had a clear view of the railroad track on which the train approached for a distance of 2000 feet, and that he neither looked nor listened, and that his failure to take any precaution whatever was such negligence on his part as would prevent a recovery.

In *Green vs. Southern Cal. Ry. Co.*, 138 *Cal.* 1, cited by counsel, the evidence showed that Mrs. Green, and her mother, Mrs. Warren, were driving out of the city of San Bernardino on "C" Street, near some foundry buildings, which buildings are on a piece of land en-

closed by a picket fence. For a large part of the journey along "C" Street, the railroad could not be seen on account of natural and artificial obstructions, except that at a point extending from 110 to 138 feet from the railroad crossing of the defendant the railroad could be seen, in the direction from which the train arrived, for some distance beyond a point 333 feet from the crossing, and from the 110 foot point, the railroad track was obscured until they reached a point 33 feet from the crossing, and from that point, by looking through the picket fence standing there, the track could be seen for a distance of 333 feet. From a point 25 feet from the center of the track there was an unobstructed view of the track for 1000 feet.

> "The women did not look over or through the picket fence; they did not look to the east when they came to the line of the right of way; they did not stop to listen; they drove right along without looking to the east or stopping to listen, until the horse was within a few feet of the track; and then, seeing the train nearly upon them, the horse was whipped and made to cross immediately in front of the locomotive, which struck the wagon, and caused the damage. The horse was *trotting* along "C" Street; but Mrs. Warren testified that it had slowed to a walk before they had reached the right of way."

Upon this state of facts of course it was held that inasmuch as the occupants of the buggy had a clear view

of the track for a distance of 28 feet to apoint where they could determine whether a train was approaching on the track more than 333 feet from the crossing, *and did not look*, and that the horse was walking when coming to a point 33 feet from the crossing where they had a clear view of 333 feet of the track that was obscured at the other point of view, *and they did not there look*, the occupants of the buggy took no precaution whatever for their own safety, and therefore were guilty of such negligence as to prevent a recovery.

Thus it will be seen that the cases relied upon by counsel as showiing the negligence of the driver of the truck in the case at bar, and as counsel would contend, showing the negligence of the passenger in the truck, the deceased, for whose death this action is brought, are not by any means parallel cases, as to facts, with the case at bar. In the case at bar, both the driver of the truck and the deceased looked at a time and place when and where they had a clear view of the railroad track for 1600 feet, and from whence it would take them only 26 seconds to cross the track. It is not a case in which the train was there, and therefore in which the physical fact refutes the statement of the witness. There was in fact no train on that track at that time within 1600 feet of the fatal crossing.

It is only in those cases in which the facts are such that all reasonable minded men must agree that the act of the party in question was an act of negligence, that the court should take from the jury, the question

of whether or not the particular act or acts constituted negligence.

> "It has often been said by this court that it is very rare that a set of circumstances is presented which enables a court to say, as a matter of law, that negligence has been shown. As a general rule, it is a question of fact for the jury, an inference to be deducted from the circumstances of each particular case, and it is only where the deduction to be drawn is inevitably that of negligence that the court is authorized to withdraw the question from the jury. This is true even where there is no conflict in the evidence, if different conclusions upon the subject can be rationally drawn therefrom. If the conceded facts are such that reasonable minds might differ upon the question as to whether or not one was negligent, the question is one of fact for the jury. These rules are so well settled as to render it unnecessary to here do more than state them. (See Herbert v. Southern Pacific Co., 121 Cal. 227; Fox vs. Oakland Consolidated St. Ry. Co., 118 Cal. 61; McKune v. Santa Clara Valley M. & L. Co., 110 Cal. 484. Seller v. Market St. Ry. Co., 139 Cal. 268."

As the Supreme Court of the United States has said:

> "On the other hand there is some testimony to show that the plaintiff ran carelessly through the

depot; that he knew that the train was approaching, and that he might have guarded himself against it if he had stopped at the exit of the depot long enough to have looked about him. But we think these are questions for the jury to determine. We see no reason, so long as the jury system is the law of the land, and the jury is made the tribunal to decide the disputed questions of fact, why it should not decide such questions as these as well as others. There is nothing in a case in which it is conceded fully and unreservedly that the defendant company is in fault on account of the manner of running its train, such as the high rate of speed, and other careless matters mentioned by the court in its instruction, which should justify the court in refusing to submit to the jury the question whether the defendant Company is relieved from the liability incurred by it, by reason of the acts of the plaintiff, showing that, in some degree, he may not have been as careful as the most cautious and prudent man would have been. Instead of the course here pursued a due regard for the respective functions of the court and the jury would seem to demand that these questions should have been submitted to the jury, accompanied by such instructions from the presiding judge as would have secured a sound verdict."

Jones vs. East Tennessee Ry. Co.,
128 U. S. 443.

The same doctrine is announced in Cain vs. N. C. R. R. Co., 128 U. S. 91, and Dunlap vs. Annie R. R. Co., 130 U. S. 649.

It will be observed that the case at bar comes directly within the principle announced in the Jones case, cited above. In that case the court held that especially for the reason that the negligence of the defendant railway company was clearly established, and in fact conceded, the question of the contributory negligence of the injured person should be submitted to the jury. In the case at bar, the undisputed evidence is, and therefore it must be taken as conceded by the plaintiff in error the railroad company was negligent in every respect in which negligence could be attributed to the operators of a railroad train. The whistle was not sounded; the bell did not ring; the noise of the train was subdued by shutting off the steam; the train within the confines of a city traveled at the tremendous rate of more than 42 miles per hour while approaching the particular crossing in question, and the other street crossings of the city. Moreover any slight application of the brakes at a time when the engineer and fireman must have seen the truck making the crossing, would have prevented the accident. If the Jones case was one in which the wanton negligence of the defendant justitfied the submission of the question of the contributory negligence of the plaintiff to the jury, then much more is the case at bar one in which not only justice but the rigid rules of the law itself demand

that the question of contributory negligence should be determined by the jury.

> "Where the testimony is conflicting, or for any cause there is a reasonable doubt as to the facts, or as to the inference to be drawn from them, negligence is a question for the jury. This rule will not be affected by the fact that plaintiff was the only witness in his behalf;" 28 Cyc. 632.

In the case of Grand Trunk Ry. Co. vs. Ives, 144 U. S. 408, the Supreme Court of the United States said:

> "As the question of negligence on the part of the defendant was one of fact for the jury to determine, under all the circumstances of the case, and under proper instructions from the court, so also the question of whether there was negligence in the deceased which was the proximate cause of the injury, was likewise a question of fact for the jury to determine, under like rules. The determination of what was such contributory negligence on the part of the deceased as would defeat this action, or perhaps, more accurately speaking, the question of whether the deceased, at the time of the fatal accident, was, under all the circumstances of the case, in the exercise of such due care and diligence as would be expected of a reasonably prudent and careful person, under similar circumstances, was no more a question of law for the court than was the question of negligence on the part of the de-

fendant. There is no more of an absolute standard of ordinary care and diligence in the one instance than in the other."

The court also set forth the facts of a Massachusetts case and as same are particularly applicable to the case at bar we quote from the decision as follows:

"The recent case of Sullivan v. New York N. H. & H. R. Co. from Massachusetts is published in 28 N. E., 911, is so similar to the one at bar on this question, that it deserves more than a passing notice. The substance of the case is stated in the syllabus by the reporter as follows: 'Plaintiff, a woman about sixty-five years of age, of ordinary intelligence and possessed of good sight and hearing, was injured at a railroad crossing. The railroad had been raised several feet higher than the side walk, and the work of grading was still unfinished, and the crossing in a broken condition. There were three tracks, and a train was approaching on the middle one. The view was obstructed somewhat with buildings, but after reaching the first track it was clear. The evidence showed that the plaintiff was familiar with the passing of trains; that she did not look before going upon the track; and that, if she had looked, she could have seen the train a quarter of a mile. When the whistle sounded she looked directly at the train and hurried to get across. Plaintiff testified that she looked before going upon the track,

but did not see the train or hear the whistle; that the only warning she had was the noise of its approach after she was on the first track; and that she did not then look to see where it was or on which track it was coming, but started to cross as fast as possible, and in so doing stumbled and fell between the rails. The signals required by the statute were not given; held, that it did not appear as matter of law that plaintiff was guilty of gross or wilful negligence, and that it was proper to submit the question to the jury.' See also Evans v. Lake Shore and M. S. R. Co. 14 L. R. A. 223; Ellis v. Lake Shore & M. S. R. Co., 138 Pac. 506; Brown v. Texas and P. R. Co. 42 La. Ann. 350; Heddles v. Chicago & N. W. R. Co. 77 Wis. 228; Parsons v. New York Cen. & H. R. R. Co. 113 N. Y. 355, 3 L. R. A. 683; Cooper v. Lake Shore & M. S. R. Co. 66 Mich. 261."

Then the court continued:

"Nothing was said by this court in Chicago R. I. & P. Co. v. Houston, 95 U. S. 697, or in Schofeld vs. Chicago M. & S. T. P. R. Co. 114 U. S. 615, which are relied upon by the defendant that in anywise conflicts with the instruction of the court below in this case or lays down any different doctrine with respect to contributory negligence. (Delaware L. & W. R. Co. v. Converse, 139 U. S. 469). Nor do the Michigan authorities, which are relied on, when read in the light of the particular

facts and circumstances of each separate case enunciate a different doctrine; but so far as applicable they tend to sustain the instructions objected to."

In that case the defendant requested the following instruction:

"If you find that the deceased might have stopped at a point fifteen or eighteen feet from the railroad crossing, and there had an unobstructed view of defendant's track either way; that he failed so to stop; that instead the deceased drove upon the defendant's track, watching the Bay City Train, that had already passed, and, with his back turned in the direction of the approaching train, the deceased was guilty of contributing to the injury, and your verdict must be for the defendant, although you are also satisfied that the defendant was guilty of negligence in the running of the train in the particulars mentioned in the declaration."

The Supreme Court of the United States in passing upon the proposed instruction said:

"The reason given by the court for refusing this request was that 'it is too much upon the weight of the evidence and confines the jury to the particular circumstance narrated without notice of others that they might think important.' This reason is a sound one. In determining whether the deceased was guilty of contributory negligence, the jury

were bound to consider *all* the facts and circumstances bearing upon the question, and not select one particular prominent fact or circumstance as controlling the case, to the exclusion of all others."

144 U. S. Reports, pg. 434.

It would appear quite clear from the foregoing authorities that the answer to the first question propounded in this brief is, that the question of the negligence of said Tucker, the driver of the truck, was properly submitted to the jury, and that the answer to the second question is that the relation of master and servant did not exist between the deceased, Wright, and the driver of the truck, Mr. Tucker, and that there was no identity of those persons in the matter of the operation and control of the truck, but that Mr. Tucker the driver had the sole and exclusive charge of the truck and of its management and control, and that the deceased, Wright, did not have the right to exercise any control over the operation or management of the truck, or over the driver thereof, and that he did not exercise nor attempt to exercise any management or control over either the one or the other, and that upon any view of the matter of the relation of the driver, Tucker, to the deceased, Wright, the case was properly submitted to the jury.

It necessarily follows that if the defendant in error was not entitled to recover from the plaintiff in error in this action, it was because that the conduct of the

deceased Wright at the time and place of the accident was such as to establish, as a matter of law, that the deceased, Wright, himself, was negligent, and that his negligence was the proximate cause of the injury.

The deceased Wright was riding in the front seat of the truck and the truck was in control of the driver. The evidence shows that Tucker was a competent and experienced operator and demonstrator of auto vehicles, including the truck in question.

Mr. Wright knew nothing about the truck, nor of its management or control. At a point not to exceed 145 feet from the railroad track crossing in question, Mr. Wright looked up the track for a distance of 1600 feet. While the evidence, of course, does not show and cannot show by positive statement of witnesses, whether or not Mr. Wright saw any train, the evidence of Tucker does show that no train was within that vision at that time. Therefore the evidence must be taken to positively and clearly establish the fact that at the time that the deceased Wright looked in a northerly direction, there was no train within 1600 feet of the railroad crossing. The truck was traveling at a rate of from four to six miles per hour. Wright had confided his safety and security to the driver of the truck, and as a reasonable minded man, he had a right to believe that under the surrounding circumstances, no train would come within the 1600 foot section of the track and pass over it in time to collide with the truck before it had made the crossing. At

the time of looking up the track he saw and knew that he was in no danger whatever. If there was a point at which Wright could determine that he was in danger, it must have been after the train was so far advanced within the 1600 feet section of the track that it would appear to an ordinary and prudent man that it would probably collide with the truck, if the truck proceeded.

Suppose, for the sake of the argument, that he did, at the time that the truck was 100 feet from the track, see or know that the train was approaching, being almost directly in front of the train he could not determine the speed at which the train was coming. This is more particularly the case because the train was "drifting in" with the steam shut off, and was being propelled by the momentum theretofore gathered. He might have seen the train and very prudently determined in his own mind that there was no danger of a collision for two reasons: First, because the train did not appear to him to be coming at such a rate of speed as to overtake and run down the truck upon the tracks; and second, that the automobile truck was in the hands of a competent and safe driver, who would control it so as to prevent any injury and who would stop if necessary at the proper point to avoid a collision unless he, the driver, should become confused by some words or acts on the part of Wright at that time.

It may be contended however, that if he saw the train coming within the 1600 foot section of the track heretofore mentioned, and saw that Tucker did not stop before or at the instant that the front end of the truck came

near the main track of the railroad on which the train was running, he should have himself jumped from the truck. To jump from a moving truck at any time or any place is a dangerous feat, but more especially would it have been dangerous at this point where, when he could have first apprehended any danger, to jump would be to jump upon the exposed track of the railroad, in the direction from which the train was approaching. It would seem that his failure therefore to jump from the truck could not be said as a matter of law to constitute negligence on his part. On the contrary it would seem that to have taken those chances under the circumstances there present, would have been not only an act of negligence, but almost an act of madness. It will be remembered in this connection that the train struck the rear wheel of the truck, showing that it was a matter of only a fraction of a second that was required to permit that truck to have passed safely over the track, and that if at any time, even 100 feet from the point of collision, the engineer had applied his brakes to the train that was drifting on its own momentum, the accident would have been avoided.

As suggested in the case of Jones v. East Tennessee Ry. Co., hereinabove cited, the fact that all of the evidence shows, and of course it is therefore conceded, that the operators of the train were negligent in every respect in which operators of trains may be negligent, it would be imperative that the alleged contributory negligence of either Wright or Tucker, and especially Wright, was a matter properly to be submitted to the

jury. In this case it was submitted to the jury and the jury determined that there was no negligence of Wright that contributed proximately to the injury. The train did not sound the whistle; its bell did not ring, and it rushed onward through the city, reckless of the lives of persons in the proper use of the highways crossing the track in that city. All of the evidence so shows it must be conceded, that the plaintiff in error was in every respect negligent.

Upon the authorities cited heretofore, and especially upon the authority of Jones v. East Tennessee Ry. Co. the question of the negligence of the deceased was a proper question for the jury, and it would have been error for the court to have taken that question from the jury.

In this contention we are not unmindful of the fact that the general rule of negligence applicable to Tucker, the driver of the truck, is applicable to Wright, the deceased. This does not mean however, that the same acts or omissions as would constitute negligence on the part of Tucker, would constitute negligence on the part of Wright. It simply means that the general rule that the doing of anything that a reasonably prudent minded man would not do under all of the circumstances of the case or the omission to do what a reasonable or prudent man would have done under all of the circumstances of the case, applies to the passenger Wright, as it applies to the driver, Tucker. But what a reasonable and prudent man would do as driver of the motor

vehicle might not be, and indeed we think in most cases could not be what a reasonable and prudent minded man would do as a passenger in the vehicle who had confided his safety and security to the experience and care of the driver. Therefore, while we contend, upon the authorities, that the question, (if it had been a question in this case) of the negligence of Tucker, would have been a proper one for the jury, we contend also that under the relation existing between Tucker, the driver, and Wright, the deceased, there was no question to be determined as to the alleged negligence of Tucker, but that the only question was as to the alleged negligence of Wright, the deceased. And under all the circumstances of this case we contend that the most that the plaintiff in error was entitled to was to have the question of Wright's negligence submitted to the jury.

The plaintiff in error in its brief contends that the admission into evidence of Section 17, of Ordinance No. 51 of the City of Selma was error, and assign as the reason for that contention that the evidence conclusively showed that the violation, if there were any, of the ordinance in question neither proximately nor remotely contributed to the collision. This contention of course cannot be properly made in this court for the reason that while the objection to the introduction of the evidence was upon the general grounds that it was irrelevant, incompetent and immaterial, that objection was qualified or made specific, and the only reasons relied upon by the counsel for its irrelevancy, incompetency and immateriality was that it was "not shown to have been

adopted in any manner at any meeting of said City Trustees, or published as required by law, or duly authenticated in anyway." Of course this objection is limited to the specific grounds stated, and the ordinance was not objectionable upon that ground for the reason that the Statute of the State of California provides that the ordinance as it appears in the ordinance book of the City is prima facie evidence of its existence, contents and effects:

> "Said record copy, with said certificate, shall be prima facie evidence of the contents of the ordinance and of the passage and publication of the same, and shall be admissible as such evidence in any court or proceeding."

Municipal Corporations Act of the State of California, Section 878.
Hennings General Laws of California, page 908.
18 Encyc. of Ev. 818.
Independent v. Trouvalle, 15 Kan. 70.
Rockville v. Merchant, 60 Mo. 365.
Metropolitan St. R. Co. v. Johnson, 76 S. E. 49.
Barber Asphalt Paving Co., v. Jurgens, 170 Cal. 273.

Wagner v. United Railroads, 19 Cal App. R. 396.

The only objection therefore, to the introduction of that provision of the laws of the City of Selma was properly overruled, and we think it cannot now be contended that the objection made at that time shall

have any broader application than the specified grounds of the objection. However that may be, it is quite clear that the objection now contended for, if it had been properly made on the trial of the case is not a valid objection. We may state that it is clear from all of the evidence in this case that if the train had not been operated at a rate of speed very greatly in excess of the speed permitted by the ordinance, there could have been no collision between the train and the automobile and therefore there was a very direct and proximate relation of the violation of this ordinance to the death of Wright, and a casual connection between the collision and the failure to observe the ordinance.

The case of Davis v. California, etc., 105 Cal. 131, cited by counsel in support of this contention states:

> "Even if it be conceded that the ordinance required the defendant to keep a lighted lantern at the rail, the only object of the requirement was to enable persons using the walk to see the rail, and if this purpose was served by the gas light, it was sufficient. It is not contended that the rail could not be seen, nor that the lanterns had been kept there until the night of the accident, and then were omitted, leading paintiff to believe the rail had been removed."

Clearly the object of the requirement of the ordinance in question was to make the speed of trains at such reasonable rate as would permit the usual and ordinary

use of the streets of Selma, and the violation of that ordinance was the proximate cause of the injury, because if the train had been approaching at the rate of eight miles an hour, and had been within 800 feet for instance, of the crossing at the time the truck was 140 feet from the crossing, the truck could safely have passed over the track and gone far on its way before the train reached the crossing.

In the case of McCune v. Santa Clara, etc., 110 Cal. 480, cited on this point by counsel, Mr. Justice Henshaw says:

> "But the principle has this very obvious limitation: The act or omission must have contributed directly to the injury, or, however improper or illegal it may have been in the abstract, no action for damages can be founded upon it. The failure of a locomotive engineer to sound his bell or whistle before crossing a highway would be essentially negligent, *but a totally deaf traveler* upon the highway, could have in no way suffered from the omission, and, as to him it would not be negligence. So, too, the requirement of a night light to warn the public of a temporary obstruction upon a street would not advantage a man absolutely blind, and the failure to maintain it would not, as to him, be negligence."

And then the distinguished Justice proceeds to say that in the case then under discussion there was no such exceptional facts present, and approved the instruction given by the trial court, which was as follows:

> "The failure to comply with a municipal ordinance, or to perform a duty which is imposed by a municipal ordinance, is negligence in itself. Therefore, if you find that the defendant, at the time of the alleged accident, was obstructing the said Fourth Street in the manner alleged, in violation of an ordinance of the City of San Jose, that in itself establishes the negligence upon the part of the defendant, and it is not necessary that the plaintiffs make any further showing of negligence in defendant in order to recover."

Clearly upon the authorities cited by counsel, the contention of the plaintiff in error upon this point is without merit.

But in view of the possibility of counsel on the oral argument raising the point that the ordinance had not been pleaded, we here state as was said by the Supreme Court of California in Craig v. Los Angeles Trust Company, 154 Cal. 669: "The cause of action here alleged was not a violation of the ordinance, but the negligence of the defendant, and the ordinance was simple evidence offered to show such negligence. Under our system of pleading, it is both unnecessary and improper to plead the evidence relied on to establish the ultimate facts essential to a cause of action."

Connell v. Harris, 23 Cal. App R. 537, 540.
Scharpf v. Union Oil Co. 19 Cal. App. R. 100.

Referring to the point made on page 102 of the brief

of plaintiff in error relative to an instruction on the matter of the ordinance, we cite the case of Stein v. United Railroads, 159 Cal. 368, holding that the giving of such instruction was proper, or more correctly speaking, that the failure to give same constituted error.

Counsel is also in error at that part of the brief where it is said "nor is there any qualification to the effect that, in the absence of contributory negligence, plaintiff in error would be responsible for an accident occurring by reason of the violation of the section." for the court (Tr. fol. 67) merely stated in effect that the failure of the plaintiff in error to comply with the ordinance (if it did so fail) constituted presumptive negligence; and thereupon the court in the next paragraph admonished the jury that before the plaintiff could recover it must appear from the evidence that the accident resulting in the death of George R. Wright was caused by the negligence of the defendant, unmixed with any negligence of the deceased.

The court in this case, at the request of the defendant, gave the following instruction:

> "You are further instructed that there is no evidence before this jury that either the fireman or engineer had any actual knowledge or notice that either Mr. Tucker or Mr. Wright were crossing or attempting to cross the railroad track in front of the approaching train, and this jury can draw no inference of negligence on the part of the defend-

ant because of the fact that the fireman or engineer might have known of the danger in which Mr. Tucker and Mr. Wright were placed. In other words, the last chance doctrine, so-called, has no application to the facts of this case, and you are to

determine this case solely under the instructions given you by the Court."

This instruction took from the jury the question of whether or not, after the operators of the train saw, or could by the exercise of reasonable diligence have seen, the danger in which the deceased was placed, the accident could have been averted by the operators of the train; and if this instruction was correct, then what is known as the doctrine of last chance of course was not in the case, and it was not for the jury to consider whether or not the accident, after the danger was apparent, and after the operators of the train knew or should have known of the danger, could have been averted by the exercise of due care. But if it was proper for the jury to consider this question, then the instruction was erroneous, and even though disregarded by the jury the verdict should stand. The rule now is,—

"That while the jury should conform to the instructions of the court upon matters of law, if it appears to the appellate tribunal that an instruc-

tion was erroneous, it will not disregard a verdict contrary to such erroneous instruction."

O'Neal v. Thomas Day Co.
152 Cal. 357.
Tousley v. Pacific Electric Railroad Co.
166 Cal. 462.

The matter under discussion is what is known as the doctrine of last chance. In many jurisdictions it has been held that before the doctrine of last chance can be applied it must be established by evidence that the defendant actually knew of the existing danger to the plaintiff, and with that actual knowledge of the danger failed or omitted to do something that would have prevented the injury, but there are numerous authorities which hold that where the omission of the plaintiff to act with proper caution after the apparent danger of the defendant was either known, *or by the exercise of proper care should have been known to the plaintiff*, the omission to so act with due care and the omission to use the ordinary care by which the danger would have been known is negligence on the part of the plaintiff and is the proximate cause of the injury.

"It is not necessary that the defendant should actually *know* of the danger to which the plaintiff is exposed. It is enough if in discharge of a duty owing the plaintiff he could, by the exercise of ordinary care, have discovered at any time by the use of the agencies at hand to have avoided the

injury. The most reckless persistence on the part of one exposed to danger will not justify another in consciously refraining from using care to avoid injury to him."

Sherman & Redfield on Negligence,
Vol. 1, Sec. 99.
Citing many other cases, among which is Grand Trunk Railroad Co. v. Ives, 144 U. S. 408.
Inland etc., Coasting Co. v. Tolson,
139 U. S. 551.

In Bourrett vs. Chicago & N. W. Ry. Co., 121 N. W. (Iowa) 380, 384, it is said: "It is manifest that whether actual knowledge of plaintiff's peril is essential, depends upon the nature of the duty due plaintiff. If he is merely a trespasser, or for some other reason the duty of observing him does not devolve on defendant, then evidently no obligation arises on defendant's part until his peril is actually discovered. But the rule is otherwise where a duty is imposed to exercise reasonable care to ascertain the danger, and ample means to do so are available. Thus persons who travel over a highway or street crossing or at places the public generally is licensed to pass are not trespassers and are where they have the right to be, and the railroad company owes them the active duty of keeping a lookout for them."

In the case just cited, there is a very full discussion of this matter, and it is there held that where there is

no duty imposed upon the defendant to watch and to know, it is not of course negligence not to watch and know, but in the case at bar it is plainly the rule that it is the business of the operators of a train on a railway to be vigilant, and to know at all times whether or not either life or property is exposed to danger upon the track ahead of the trains.

Grand Trunk Railroad Co. v. Ives,
144 U. S. 408.
Denver Etc. Ry. Co. v. Buffehr,
69 Pac. 582 (Colorado).
Cincinnati H. & D. R. Co. v. Kassen,
31 N. E. 282 (Ohio).
Richmond Traction Co. v. Martin,
45 S. E. 886. (Virginia).
Gunther v. St. Louis Etc. Ry. Co.,
18 S. W. 846 (Missouri).

This doctrine is called the humanitarian doctrine and it is said:

"The humanitarian doctrine takes the imperiled person where it finds him, and makes one liable for injuring him, where he saw, or by ordinary care might have seen his peril in time by the use of the means at hand to avoid injuring him."

Sherman & Redfield on Negligence,
Note. Section 99, page 254.

This doctrine is also laid down in Thompson on

Negligence, Sections 239, and in White's Supplement to Thompson on Negligence, Section 239, with many cases there cited.

It is quite apparent from the foregoing authorities that it is the duty of those in control of a train upon a railway track to keep a vigilant look-out for any obstruction upon the track to avoid injury to the property of the railway Company and to passengers and crew on board the train, and to avoid injury to the property of others that might by accident or inadvertence, or neglect be upon the the track, and for the protection of human life in the event that any person or persons might venture upon the track ahead of the train.

This would be of course the emphatic duty of the persons in control of a train in all places and under the circumstances surrounding the accident upon which the case at bar is based. There can be no question either upon ordinary common sense or upon authority that it was the legal and moral duty of the operators of the train to take extraordinary care and precaution for the safety of human lives while propelling the train through the city and crossing the public highways of the city at the time and place that this accident occurred.

It would seem therefore that it was the duty of the trainmen to know who or what was upon the track before them or what person or persons were approaching the track in such proximity to the track ahead of the train as to endanger their lives. This being the duty of the

operators of the train, the authorities above cited would hold that whether or not the evidence established that they did actually see the dangerous position in which the occupants of the truck were placed, they are charged by the law and by the mandates of humanity with the same duty or responsibility as if they had discharged their proper and necessary duty of looking ahead upon the track.

There can be no doubt that this train was three hundred feet from the crossing and from the point of collision when the truck had approached and was going upon the main track of the railroad. While the engineer may not be required to observe that which is not on or about to go upon the track, certainly the presumption is that he does see what is on the track ahead of his engine; and therefore when the engineer saw the dangerous position of the deceased and the driver of the truck, he could, by applying the brakes of the train, have avoided the accident, though unable at that time to bring the train to a full stop. The train drifting in, propelled by its own momentum and not by steam, could have been checked sufficiently by the application of the brakes so that it would not have reached the crossing until the truck had crossed the track. If that application of the brakes had been made even at a distance of 100 feet from the point of collision, the accident would not have occurred, as a half second more time would have been sufficient for the truck to have passed the track in safety.

The exceptions of plaintiff in error numbered from

12 to 35, relate to instructions offered by the plaintiff in error and refused by the court.

We deem it proper to call the attention of the court very briefly to these exceptions for the purpose of showing that it was not error to refuse the instructions:

No. 12. This instruction was given by the court verbatim, except the last clause therein:

> "No recovery can be had against the railroad company for such an accident."

And instead of that clause the court used the concluding expression: "He is guilty of contributory negligence." Inasmuch as the court had instructed the jury that the plaintiff could not recover unless the accident resulted from the negligence of the defendant unmixed with any negligence of the deceased, (Tr. Fol. 67) it was not error to refuse the instruction, as it was substantially given and fully covered by the instructions of the court.

No. 13. Was an instruction taking from the jury the question of contributory negligence of Wright, and Tucker as well, and taking also from the jury the question of the imputability of any negligence of the driver to Wright, which, upon the authorities herein cited would have been error.

No 14. Was an instruction taking from the jury, the

question of the imputability of the negligence of the driver of the truck to Wright, and was clearly wrong.

No. 15. Was an instruction taking from the jury the question of contributory negligence entirely, as well as the question of the imputability of the negligence of the driver of the truck and was therefore wrong.

No. 16 was an instruction that would take from the jury the question of imputability of negligence, and so far as it was the law was covered by instructions given by the court. (Tr. Folio 68).

No. 17 was an instruction that would take from the jury the question of the relation of the deceased to the driver and was therefore wrong.

No. 18 was fully covered by instructions given by the court. (Tr. Folio 70).

No. 19 was fully covered by instructions given by the court. (Tr. Folio 65).

No. 20 was an instruction that would take from the jury the question of the relation of the deceased to the driver of the truck, and was fully covered as to the deceased by instructions given by the court. (Tr. Folio 67).

No. 21 was an instruction taking from the jury the question of the relationship of the driver of the truck and the deceased, and the imputability of negligence, and

so far as it applied to the negligence of Wright, the deceased, was fully covered by instructions given by the court. (Tr. Folio 67).

No. 22 was an instruction taking the question of the relation of the driver and the deceased, and the imputability of negligence from the jury, and so far as it related to obstructed view was not based upon any evidence in the case, and so far as the law was concerned as to the negligence of the deceased, was fully covered by instructions given by the court. (Tr. Folio 67 and 68).

No 25 was an instruction taking from the jury the question of contributory negligence in its entirety, and was based upon no evidence in the case, and took from the jury the question of the relation of the deceased to the driver of the truck.

No. 24 was an instruction fully covered by instructions given by the court. (Tr. Folio 67).

No. 25 takes the question of contributory negligence from the jury and includes the negligence of the driver as imputable to the deceased.

No. 26 was fully covered by instructions given by the court. (Tr. Folio 70).

No. 27 took from the jury the question of the relation of the driver of the truck to the deceased, and the question of imputability of negligence of the driver to the deceased.

No. 28 was fully covered by instructions given by the court. (Tr. Folio 65, 70).

No. 29 was an instruction fully covered by instructions given by the court. (Tr. Folio 65).

No. 30 was an instruction taking from the jury the question of the relation of the deceased to the driver of the truck, and also of the imputability of the negligence of the driver, if any, to the deceased, and was fully covered so far as it was the law by instructions given by the court. (Tr. Folio 68).

No. 31 was an instruction taking from the jury the question of the relation of the deceased to the driver of the truck, and the question of the imputability of the negligence of the driver of the truck to the deceased.

No. 32 was an instruction which takes from the jury the question of the relation of the deceased to the driver of the truck, and of the imputability of negligence in the case.

No. 33 was objectionable upon the same grounds as No. 32, but so far as it was the law was fully covered by instructions given by the court. (Tr. Folio 68 and 69).

No. 34 was an instruction taking from the jury the question of contributory negligence in its entirety, and taking from the jury the question of the relation of the driver of the truck to the deceased, and was wrong.

No. 35 was an instruction taking from the jury all questions in the case, and was not law.

In this case a motion for a new trial was made in the District Court by the plaintiff in error. After argument thereon the motion was submitted, and after having duly considered the same, the learned Judge who tried the case announced the court's decision and the oral opinion then rendered was taken down and thereafter transcribed by the court reporter. That opinion covers certain phases of the case so clearly and concisely that counsel for defendant in error desire to adopt same as a part of the argument in this brief, and therefore set forth said opinion as follows:

> "This is a motion for a new trial based upon a bill of exceptions. Judgment was rendered in the case in favor of the plaintiffs and against the defendant. The action is brought by the widow and children of Mr. Wright who was killed by reason of the fact that the train of the defendant struck an automobile truck in which the deceased was riding, when the truck was crossing the tracks of defendant on a street in the town of Selma.
>
> The facts, briefly stated, so far as it is necessary for me to state them, concerning the motion for a new trial, are these:
>
> Wright and a man named Tucker were in the truck. Tucker was driving it. The truck was rent-

ed to Wright by the owner on condition that Tucker would drive it. Tucker claimed to have complete control of the truck. The truck came down along the side of the track and turned to cross the track on a street crossing. Where they turned to the right it was 145 feet from the railroad track upon which the train was operated. At the time they so turned Tucker looked up the track to see if there was any train coming. He says that Wright also looked. He could see up the track approximately 1500 feet and no train was in sight. The truck proceeded to cross the track and no further endeavor was made by Tucker or Wright to see whether or not a train was coming from that direction. It may be that Wright knew that the train was coming, but there is no direct evidence to that effect. The evidence shows that the train came down the track, some 1500 feet, without blowing a whistle or ringing a bell. All of this distance was in the town of Selma. No signal whatever was given, and the train was run so it made no noise that would attract attention. The truck got pretty nearly across the track when the engine struck the rear end of it and the train was stopped so that the last car stood across the crossing. Wright was instantly killed. While this train was running this distance, approximately 1500 feet, and making no noise, the truck was in plain view of the engineer and fireman on the locomotive, if they were looking. There is no direct evidence that the engineer or fireman saw this truck. From the circumstances, however, the jury might be justified

in believing that there was an engineer and fireman on the engine, and that they were performing their duties; that they saw these men in the truck; saw that they were not looking in the direction of the train, and saw that they were constantly placing themselves in greater jeopardy. If the engineer had held the train and made it two seconds slower the accident would have been avoided.

The complaint simply alleges that Wright was killed by reason of the negligence of the defendant. The answer denies this and sets up contributory negligence in Wright and Tucker. Under the practice in California this answer of contributory negligence stands denied. Under that denial the plaintiff has a right to prove any matter that would meet the issue of contributory negligence.

The defendant introduced no evidence, but the Court, at the request of the defendant instructed the jury that the doctrine of last clear chance did not apply. The jury were not instructed concerning what the law was in regard to the doctrine of last clear chance, but instead thereof the jury were, in effect, given an instructed verdict as to that issue.

The defendant argues that the instruction of the Court settled the law of the case; that the jury was bound by the instructions of the court, and that this court must now grant a new trial if the jury disregarded the instructions. The conclusion

from this argument is that two errors will make a right. This contention of the defendant is not the law in California as appears in the case of Tousley vs. Pacific Electric Railway Company, 166 Cal. 457, 462, and it appears that it is not the law in the Federal Courts. Grand Trunk Railway Company vs. Ives, 144 U. S., 408, 431.

The rule of law in the United States Courts concerning the doctrine of last clear chance is set forth in an instruction given by the Supreme Court in Island & Seaboard Navigation Company vs. Tolson, 139 U. S., 551, 558, as follows:

'There is another qualification of this rule of negligence, which it is proper I should mention. Although the rule is that, even if the defendant be shown to have been guilty of negligence, the plaintiff cannot recover if he himself be shown to have been guilty of contributory negligence which may have had something to do in causing the accident; yet the contributory negligence on his part would not exonerate the defendant, and disentitle the plaintiff from recovering, if it be shown that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the plaintiff's negligence.'

It was objected that in that case the instruction was wrong because there was no evidence that the defendant knew the peril of the plaintiff. The of-

ficers in charge of the steamer in that case knew simply where the plaintiff stood, but it does not appear that they knew he was in any peril.

This rule of the last clear chance is contrary to the way the common law rule is interpreted by the Supreme Court of the State of California, but this court is not bound by the decisions of the Supreme Court of the State of California in interpreting the doctrine of the common law. The case last above cited is also cited and relied upon in Klockenbrink vs. St. Louis, Etc., 172 Mo. 788; 72 S. W., 903, and other cases as appears by the notes to the decision. I call attention here to the case of Grand Trunk Railway Company vs. Ives, Supra, in this connection. In that case the essential facts, in so far as it may be necessary to consider them for the purpose of applying the principal of the last clear chance doctrine, cannot be distinguished from the facts in the case at bar. In that case the people approached and went upon the track looking the other way from the direction from which the train which killed them approached. They were undoubtedly guilty of contributory negligence if the rule applies that a person must look when approaching a railroad track, especially where they are perfectly familiar with the existence of the track. These people did not look. The Court instructed the jury that if they were guilty of contributory negligence they could not recover, but the jury returned a verdict in their favor, notwithstanding the instruction.

The Supreme Court upheld the verdict. What is the difference between that case and this?

It seems, also, to the Court, that other instructions given concerning contributory negligence, which took from the jury certain phases of contributory negligence, were in violation of the rule concerning contributory negligence as laid down by the Supreme Court of the United States.

The defendant in this case, it seems to me, has had a fair trial. If there was any excuse for the gross, almost inhuman, negligence shown by this evidence, it seems to me that it was the duty of the defendant to present the evidence to the jury.

The motion for a new trial will be denied."

We respectfully submit that the judgment and order, appealed from herein, should be affirmed.

FRANK KAUKE,
Attorney for Defendants in Error.